

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Wireless Consumers Alliance, Inc, for a Declaratory Ruling concerning whether the provisions of the Communications Act of 1934, as amended, or the jurisdiction of the Federal Communications Commission thereunder, serve to preempt state courts from awarding monetary relief against commercial mobile radio service ("CMRS") providers (a) for violating state consumer protection laws prohibiting false advertising and other fraudulent business practices, and/or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort laws)	WT 99-263

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation and its telephone and wireless companies ("GTE") hereby submit their reply comments in opposition to the Petition for Declaratory Ruling ("Petition") filed by the Wireless Consumers Alliance, Inc.

I. INTRODUCTION AND SUMMARY

Congress has expressly, unambiguously, and categorically preempted all state law that regulates the rates of CMRS providers. Congress has enacted such broad legislation in an effort to promote a uniform, national cellular telephone system based on competitive market forces rather than state-by-state regulation. Undeterred, the Petition asks the Commission to rule, in the broadest terms imaginable, that the Communications Act of 1934, 47 U.S.C. § § 151 *et seq.* ("the Communications Act") does not preempt state courts from awarding monetary damages against CMRS

providers in connection with state law claims for breach of contract, tort, or alleged violations of consumer protection laws. The Petition's proponents contend, based on melodramatic hyperbole rather than legal logic, that if the Commission denies the Petition and rules that such claims are preempted, then this ruling would eliminate all state consumer protection damage claims against CMRS providers.

The proponents' arguments are based on the false dichotomy that the Commission must issue an all or nothing ruling – that is, either all state law damages claims against CMRS providers are preempted or none of them are. This reasoning is faulty because it ignores the preemption scheme that Congress created in Section 332(c)(3)(A) of the Communications Act, which expressly preempts all state regulation of the rates charged for CMRS. See 47 U.S.C. § 332(c)(3)(A) (“No state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . .”). By its terms, Section 332(c)(3)(A) predicates the preemption analysis on a determination of whether a particular state law claim constitutes, in essence, a challenge to the lawfulness and reasonableness of CMRS rates. Those claims that do challenge CMRS rates are expressly preempted by Section 332.

WCA and the Petition's other proponents do not even attempt to explain how the Commission could conclude that state law claims *never* constitute a challenge to CMRS rates. Moreover, the relief requested by the Petition does not allow for an individualized consideration of whether particular claims constitute a challenge to the lawfulness and reasonableness of CMRS rates. Thus, the Petition should be denied.

II. ARGUMENT AND AUTHORITIES

The Petition's proponents contend that if the CMRS providers' preemption arguments succeed, then consumers would be without any relief for violations of state consumer protection laws. See, e.g., Comments of Public Citizen, Inc. at 16 (characterizing it as "inconceivable" that "Congress intended to obliterate in one fell swoop . . . the protections provided by the states' tort, contract and consumer protection regimes"); Comments of Ralph Nader at 1 ("preemption of state court remedies by CMRS providers would leave consumers vulnerable to CMRS abusive practices, and largely without remedy when victimized by such practices"); Comments of Texas Office of Public Utility Counsel at 3 ("If one accepts Defendants' arguments, the Communications Act effectively immunizes CMRS providers from liability for deceptive trade practices and contractual breaches.").

This argument rests on a fundamental misapprehension of the CMRS providers' position regarding preemption. GTE does not contend that the Communications Act preempts any claim that a CMRS provider's conduct violates contract or state consumer protection laws. Rather, the Communications Act preempts claims that, in substance, challenge the lawfulness and reasonableness of CMRS rates. One example of preempted claims are those asserted by the plaintiffs in *Ball v. GTE Mobilnet of California Ltd.*, No. 98AS03811 (Cal Super. Ct. (Sacramento County) Nov. 17, 1998). In *Ball*, the plaintiffs alleged, among other things, that the defendant CMRS providers' per-minute billing practices violated California's consumer protection statutes. The court dismissed plaintiffs' claims, holding that the claims were preempted because they constituted a direct challenge to the calculation of the CMRS providers' rates.

As the *Ball* decision makes clear, some state law claims constitute a challenge to CMRS rates and, thus, fall squarely within Section 332(c)(3)(A)'s ambit. See also *In re Comcast Cellular Telecommunications Litigation*, 949 F. Supp. 1193 (E.D. Pa. 1996) ("the Plaintiffs' claims present a direct challenge to the calculation of rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a [CMRS provider], something it is explicitly prohibited from doing."). Because some state law claims indisputably challenge CMRS rates, the blanket ruling that WCA seeks is simply not appropriate.

When a state law claim seeks relief that would have the effect of prospectively or retroactively regulating CMRS rates, the Communications Act necessarily preempts the claim. Despite the WCA's request for a broad-brush ruling, whether a particular claim falls within this category of preempted claims requires case-by-case analysis as to whether the claim has the effect of challenging the reasonableness of CMRS rates or seeking rate regulation. This determination is best left to the courts.

III. CONCLUSION

For the foregoing reasons, and those set forth more in the Comments of GTE Service Corporation previously filed in this proceeding, GTE respectfully submits that the Commission should deny the relief requested by the Wireless Consumers Alliance, Inc.'s Petition.

Dated: October 12, 1999

Respectfully submitted,

GTE Service Corporation and its telephone
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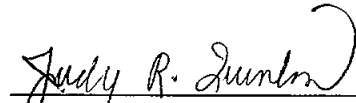
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CERTIFICATE OF SERVICE

I, Judy R. Quinlan, hereby certify that copies of the foregoing "Reply Comments of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on October 12, 1999 to the parties on the enclosed list.



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